IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2019-485-429
[2021] NZHC 1058

BETWEEN	BNZ BRANCH PROPERTIES LIMITED First Plaintiff
	BANK OF NEW ZEALAND Second Plaintiff
AND	WELLINGTON CITY COUNCIL Defendant
AND	BECA CARTER HOLLINGS & FERNER Limited First Third Party
AND	JOHN BARRIE MANDER Second Third Party

Hearing: 1 October 2020

Appearances: M G Ring QC and T Cleary for First Third Party
L J Taylor QC and B J Sanders for Defendant

Judgment: 12 May 2021

JUDGMENT OF CLARK J

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Introduction

[1] CentrePort Limited owns land at Waterloo Quay, Wellington. In October 2006, CentrePort entered into an agreement with Bank of New Zealand (BNZ) to construct a building on the land. BNZ would lease the building which would serve as the main Wellington office for its operations. Designed to meet BNZ's specific requirements, including as to size, layout, dimensions, facilities and performance, the building was constructed in stages between 2006 and 2010. BNZ leased the premises from CentrePort from around February 2011.

[2] As a result of the Kaikoura earthquake in November 2016 the building suffered irreparable damage. Neither BNZ nor its subsidiary operating company BNZ Branch Properties Limited (BNZBPL) have been able to return to the building since the earthquake. Being uneconomic to repair, the building is being deconstructed.

[3] In August 2019, BNZ and BNZBPL filed a statement of claim seeking from the Wellington City Council (the Council) "damages of no less than $101,243,345".

The plaintiffs allege the Council was negligent in granting the building consent application for the building superstructure. The plaintiffs also allege the Council was negligent in its inspection of the building work and in issuing a code compliance certificate (CCC).

[4] On 26 September 2019, the Council filed proceedings against the third parties, Beca Carter Hollings & Ferner Limited (Beca) and Professor John Barrie Mander. Beca was engaged by CentrePort to provide structural engineering services for the design of the building. Professor Mander is said to have been engaged by Beca to peer review the design details.

[5] Beca applies for an order striking out the Council's claim or, in the alternative, summary judgment against the Council on all three causes of action pleaded against Beca.

Overview and issues for determination

Beca's position

[6] Beca's case is that the Council is prohibited from issuing proceedings more than 10 years after Beca carried out allegedly negligent engineering design and construction monitoring services.

[7] Beca submits that s 393(2) of the Building Act 2004 (the longstop) prohibits the Council's claim given that the acts or omissions relied on ended on 12 March 2008 and the Council first filed a third party claim on 26 September 2019.

[8] In relation to the Council's pleading that Beca owed an ongoing duty of care, Beca argues the courts have rejected a continuing duty of care as a means to extend the longstop.

Wellington City Council's position

[9] The Council's focus is on the right of a tortfeasor to recover contribution from another tortfeasor and the primacy of that right. The Council argues that s 17 of the Law Reform Act 1936, which enacted the right of contribution, was not "swept aside"

by the introduction of the 10-year longstop in the Building Act 1991 and the Building Act 2004.

[10] The Council accepts there is a line of High Court decisions holding that the 10-year longstop limitation has the effect of excluding contribution claims brought after the expiry of 10 years but submits these decisions are wrong.

Issues for determination

[11] The principal legal questions raised by Beca's opposed application are:

(a) whether the 10-year longstop period in s 393(2) of the Building Act 2004 applies to claims for contribution under s 17 of the Law Reform Act 1936; and

(b) whether Beca owed BNZ and the Council ongoing duties of care.

Applicable principles

Strike-out

[12] The applicable principles are not in contention:[1]

(a) The strike-out application proceeds on the assumption that whether or not they are admitted pleaded facts are assumed to be true;

(b) Before a proceeding may be struck out the causes of action must be "so clearly untenable" they cannot succeed;

(c) The jurisdiction is to be exercised sparingly and only when the Court is satisfied it has the requisite material; and

(d) The jurisdiction is not excluded by reason only that an application raises difficult questions of law and requires extensive argument.

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1 *Attorney-General v Prince* [1998] 1 NZLR 267 (CA) at 267; *Couch v Attorney-General* [2008] NZSC 45; [2008] 3 NZLR 725 at [33].

[13] In *Couch v Attorney-General* Ellis CJ and Anderson J said:[2]

> [33] It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing. …

[14] In relation to a duty of care:[3]

> … Whether the circumstances relied on by the plaintiff are *capable* of giving rise to a duty of care is the question for the Court. If a duty of care cannot confidently be excluded, the claim must be allowed to proceed. It is only if it is clear that the claim cannot succeed as a matter of law that it can be struck out.

[15] Beca accepts that to succeed in its application to have the claims struck out it must show that the Council's causes of action are "clearly statute-barred".[4]

Summary judgment

[16] Where an application to strike out is determined on the pleadings alone, summary judgment requires evidence. To obtain summary judgment against the plaintiff the defendant must show on the balance of probabilities that the plaintiff cannot succeed.[5] The following further statements of principle from *Westpac Bank Corp v M M Kembla New Zealand Ltd* are relevant to Beca's application:[6]

(a) Where material facts are disputed or cannot be confidently found from affidavits, the summary judgment procedure is inappropriate.

(b) Novel or developing points of law may require the evidential context provided by trial to give the Court a sufficient perspective.

(c) Summary judgment procedure is inappropriate to decide "the sufficiency of the proof of the plaintiff's claim".[7]

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2 *Couch v Attorney-General*, above n 1, at [33] (footnotes omitted).
3 At [2].
4 Citing *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 at [33].
5 *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298, at [62].
6 At [62]–[64].
7 At [63].

(d) The defendant must show that none of the claims can succeed, an onus it may discharge by producing evidence upon which the Court may be so satisfied. The Court's assessment is not to be reached on the basis of a "fine balance" of the evidence such as is appropriate at trial.

[17] Beca accepts that to obtain summary judgment against the Council, Beca must show, on the balance of probabilities, that the Council's causes of action are statute barred.

Material facts

[18] The plaintiffs plead that Beca "was responsible for, *inter alia*, the engineering design of the building, including but not limited to the building's substructure and superstructure". Beca accepts it was engaged by CentrePort in June 2006 to:

(a) prepare the engineering design for the building's superstructure and substructure;

(b) monitor the construction of the superstructure and substructure; and

(c) provide other engineering and construction monitoring services in relation to other aspects of the building including the internal fitout.

[19] Mr Lander, a structural engineer and Principal and Technical Director formerly employed by Beca, provided an affidavit in support of Beca's strike-out application. Mr Lander's evidence is that Beca was contracted to monitor the construction of its structural design "to a CM3 level (as defined by Engineering New Zealand, formally IPENZ)". The monitoring would involve attending the site on average once or twice a week to observe and inspect random samples of important work to see if the work was generally in accordance with the design intent.

[20] Mr Lander deposed to initially carrying out the construction monitoring but towards the end of the project supervised the construction monitoring carried out by other Beca staff.

[21] Beca's engagement was governed by a Consultancy Agreement for Services – Engineer. Beca also entered into a Deed of Professional Care – Engineer with CentrePort, BNZ and Fletcher Construction Co Ltd under which Beca covenanted:

> (a) [Beca] has and will continue to exercise all reasonable care, skill and diligence in providing its Agreed Services.
>
> (b) [Beca] acknowledges and accepts that notwithstanding any novation of the Consultancy Agreement to the Contractor or any other party it will continue to owe a duty of care to CentrePort, the Contractor and BNZ to exercise reasonable care, skill and diligence in providing its Services.

[22] The building project commenced in June 2006 and was completed around August 2011 as per the following chronology.

Date	Event
11/06/2006	Beca produced its preliminary design report for the building
04/10/2006	Beca produced an engineering design for the substructure along with a PS1 Design Producer Statement for the design of the substructure
13/11/2006	Council issued Building Consent SR153556 (construction of piling, ground beams and level 0)
19/11/2006	Beca issued a PS1 for the design of the superstructure
19/02/2007	Beca sent to the Council a letter of endorsement from Professor Mander and an updated PS1 Design Producer Statement to cover all documentation submitted for the design of the superstructure
23/02/2007	Council issued Building Consent SR155010 (superstructure and in ground services)
18/12/2007	Council issued Building Consent SR162913 (building envelope)
12/03/2008	Beca issued a PS4 Construction Review for the building work relating to the superstructure consent (SR155010) and the substructure consent (SR153556)
13/06/2008	Council issued Building Consent SR167184 (base building interiors, services and fire design)
27/03/2009	Code Compliance Certificate issued for SR155010 (superstructure)
19/05/2009	Council issued building consent SR194323 (fitout of tenancy space)
07/08/2009	Code compliance certificate issued for SR194323
21/09/2009	Council issued building consent SR200293 (interior fit out to level 5 and pier 1)
21/09/2009	Building Consent SR200293 issued
28/01/2010	Code Compliance Certificate issued for SR200293
12/03/2010	Code Compliance Certificate issued for SR153556 (substructure) in

	reliance on Beca's PS4
10/05/2010	Beca issued PS1 for Building Consent SR211780
29/06/2010	Code Compliance Certificate issued for SR162913
08/07/2010	Beca issued PS4 for Building Consent SR211780
05/11/2010	Beca issued PS4 for Building Consent SR167184
18/11/2010	Council issued Building Consent SR220358 (internal alterations)
26/11/2010	Code Compliance Certificate issued for SR167184
22/08/2011	Code Compliance Certificate issued for SR220358
00/08/2011	Completion of Project

[23] Beca continued to carry out construction monitoring after 12 March 2008 until the construction was completed in 2011, although Mr Lander's evidence is that the monitoring had nothing to do with the consented superstructure or the substructure.

[24] Council records indicate the Seddon earthquake in July 2013 caused significant damage to the building. CentrePort applied for a building consent on 27 November 2013 for upgrades to the seismic restraints in the in-ceiling services across the building. The application named Mr Lander of Beca as the structural engineer. Mr Lander states in his affidavit that:

> Beca was engaged to help inspect the Building, carry out some of the design works, and peer review and supervise other engineers' work who had been contracted to carry out design works.

[25] Mr Lander also states that at no point in providing the further services did Beca become aware of any defects in the design of the building.

[26] The Council says Council records show that as part of Beca's involvement in the seismic upgrade it reviewed and redesigned the seismic capabilities and capacities of at least part of the building and issued on 27 March 2014 as part of the seismic upgrade, a peer review of the design of the seismic upgrade to the building, seismic restraint calculations, structural plans and a PS1 and PS2.

Building Act 2004

[27] Beca contends that the Council's case is barred by the longstop provision in s 393(2) of the Building Act 2004. Section 393 provides:

393 Limitation defences

(1) The Limitation Act 2010 applies to civil proceedings against any person if those proceedings arise from—

(a) building work associated with the design, construction, alteration, demolition, or removal of any building; or

(b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.

(2) However, no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.

(3) For the purposes of subsection (2), the date of the act or omission is,—

(a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be; and

(b) in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.

[28] The predecessor to s 393 was s 91 of the Building Act 2001 which (relevantly) provided:

91 Limitation defences

(1) Except to the extent provided in subsection (2) of this section, the provisions of the Limitation Act 1950 apply to civil proceedings against any person where those proceedings arise from —

(a) Any building work associated with the design, construction, alteration, demolition, or removal of any building; or

(b) The exercise of any function under this Act or any previous enactment relating to the construction, alteration, demolition, or removal of that building.

(2) Civil proceedings relating to any building work may not be brought against any person 10 years or more after the date of the act or omission on which the proceedings are based.

…

[29] The issue is whether the statutory prohibition on the institution of proceedings relating to building work outside the longstop period applies to claims for contribution such as the claim the Council brings against Beca. Mr Ring QC submitted that the effect of a line of authority since 2006 is that claims for contribution are subject to the 10-year longstop. Mr Ring cited in particular the conclusion Fitzgerald J reached in *Minister of Education v James Hardie New Zealand*:[8]

> … to exclude contribution claims which clearly relate to building work would be contrary to the plain wording of the longstop provisions in both the 1991 and 2004 Acts, as well as the clear Parliamentary intent which lies behind those provisions.

[30] In what appears to be the most recent High Court decision on the point, *Body Corporate 378351 v Auckland Council*, Associate Judge Smith summarised the essence of the line of High Court decisions on the point:[9]

> [113] In case the matter goes further, and I am held to have erred in striking out the plaintiffs' claims against the Council in respect of the structural defects and the fire defects, I record my view that the third party claims made by the Council against Beca should be struck out in any event.
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> [114] I accept the view expressed in a line of High Court decisions, including *Dustin v Weathertight Homes Resolutions Services*, *Carter Holt Harvey Ltd v Genesis Power Ltd*, *Body Corporate 169791 v Auckland City Council*, and the decision of Fitzgerald J in *Minister of Education v James Hardie New Zealand*, that longstop provisions do apply to contribution claims such as that made by the Council against Beca in this case. As Fitzgerald J said in *Minister of Education v James Hardie New Zealand*:
>
> > … there is no suggestion in the legislative history that cross-claims as between building professionals and/or territorial authorities, or third party contribution proceedings, were to be excluded from the finality and certainty which was sought through the longstop provision. Had such an important and broad exclusion been intended from the otherwise plain words used, one might have expected Parliament to have said so expressly.

[31] In *Carter Holt Harvey Ltd v Minister of Education* the Supreme Court was invited to consider whether the longstop in the Building Act prevented contribution claims under s 17(1)(c) of the Law Reform Act 1936 because such proceedings were "civil proceedings" and related to building work.[10] While noting conflicting

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8 *Minister of Education v James Hardie New Zealand* [2018] NZHC 22 at [64].

9 *Body Corporate 378351 v Auckland Council* [2020] NZHC 1701 at [113]–[114] (footnotes omitted).

10 *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95 at [126].

High Court authority on the issue, the Supreme Court observed there was no appellate authority on the point and preferred therefore not to express a view as to whether a contribution claim would be time-barred by the longstop provision.[11]

[32] I am of course, aware of the reasons for the enactment of the longstop provision in the Building Act. In *Gedye v South* the Court of Appeal referred to Glazebrook J's "helpful discussion of the background to the enactment of s 91(2)" contained in *Klinac v Lehmann*.[12]

[33] Since *Klinac v Lehmann* the Courts have continued to find Glazebrook J's discussion of the legislative history to be relevant and helpful to their approach to the longstop provision and whether or not it extends to claims for contribution. I return to *Klinac v Lehmann* but for the moment I observe that no claim for contribution, nor any issue concerning contribution, arose in that proceeding.

[34] It is not apparent from the decisions upon which Beca relies that the Courts were invited, as the Court has been invited in this proceeding, to engage with the legislative history leading to the enactment of provisions that solidified a right to claim contribution. Section 34 of the Limitation Act 2010, for example, contains a limitation defence period that stands in competition with the longstop period in the Building Act. I turn now to that history which begins with a consideration of the Law Reform Act 1936.

Claims for contribution under the Law Reform Act 1936

[35] In its amended statement of claim against the first and second third parties the Council pleads that if it is liable to the plaintiffs it is entitled to contribution from Beca pursuant to s 17(1)(c) of the Law Reform Act on the basis that Beca is a concurrent tortfeasor and the Council is entitled to a contribution to the extent of a complete indemnity from Beca. The Council also contends it is entitled, in equity, to contribution.

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11 At [127].

12 *Gedye v South* [2010] NZCA 207, [2010] 3 NZLR 271 at [30] referring to *Klinac v Lehmann* (2002) 4 NZ ConvC 193,547 (HC).

[36] Section 17 of the Law Reform Act provides:

> **17 Proceedings against, and contribution between, joint and several tortfeasors**
>
> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—
>
> …
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.
>
> …

[37] Part 5 of the Law Reform Act contains one provision only, namely, s 17. It has been said that Part 5 of the Law Reform Act effected a substantial change in the law relating to joint tortfeasors in that it:[13]

(a) abolished the rule in *Brinsmead v Harrison* "that judgment against one joint tortfeasor is a bar to any subsequent action against another joint tortfeasor liable in respect of the same damage";[14] and

(b) the rule in *Merryweather v Nixan* "that there is no contribution between joint tortfeasors".[15]

[38] Following presentation of the Statutes Revision Committee's report on the Law Reform Bill, the Attorney-General was commended for "bringing down the Bill" which would "aid in the administration of justice, and give justice to many people who hitherto have been refused it, owing to the technicalities of the law".[16]

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13 R G McElroy & T A Greeson *The Law Reform Act 1936* (1st ed, Butterworth & Co, Auckland, 1937 at 76.

14 *Brinsmead v Harrison* (1872) L.R. 7 C.P. 547.

15 *Merryweather v Nixan* (1799) 8 Term Rep. 186; 101 E.R. 1337.

16 (3 September 1936) 246 NZPD 870.

[39] In moving the committal of the Bill, the Attorney-General said:[17]

> Part V of the Bill deals with law concerning wrongdoers. If two or more people commit a wrong the old rule provides that action may be taken against one of them and judgment recovered but that one cannot turn around and ask the other wrongdoer to contribute. I have no doubt that when the law was passed those concerned felt that they were acting upon a moral principle. It was felt that wrongdoers should not be encouraged, that to enable them to share the liability was to uphold them or to make a sort of bargain in relation to their wrongdoing, and that there should be no encouragement or bargaining in relation to wrongdoing. That was no doubt the morality which inspired that rule. Whatever may be said in regard to that principle in the abstract, it is not fair, for this reason: that a man might be found liable for wrongdoing when actually he has no reasonable means of discovering that he is liable – for example, a man may handle property which he honestly thinks he has the right to handle, but it may turn out, thorough a defective title, that he had no right to handle it. Consequently, *it is possible for a man to commit wrongs without really knowing he is committing them, and in some cases it is only proper that if there are two men involved in the wrong they should share the burden. This part of the Bill enables that to be done; it gives certain discretionary powers to the Court, which will see that justice is done in such cases*.

[40] In *Body Corporate 330324 City Gardens Apartments v Auckland Council* Fogarty J considered a statement from the Australian text, *Equity Doctrines and Remedies* concerning the history of contribution:[18]

> … There were a number of relationships cognisable both at law and in equity which involved co-ordinate liabilities in this sense. … Joint tortfeasors were long in a different position. For the common law turned its face against contribution between joint tortfeasors in *Merryweather v Nixan* [citation omitted] and equity followed the law, with the result that the right as it exists today rests upon statutes modelled after the ambiguously phrased Imperial law Reform (Married Women Tortfeasors) Act 1935.

[41] Fogarty J noted that the New Zealand Law Reform Act followed the Imperial Law Reform.[19] Addressing the twin principles of "natural justice" that applied, his Honour continued:[20]

> … On the one hand, it would be unjust for the plaintiff to over-recover an award of damages by being able to collect more than the aggregate damages. And, on the other hand, it would also be contrary to natural justice for the plaintiff to be able to select from several judgment debtors, the one from whom to collect the judgment, the law leaving that party bereft of any ability to collect a fair contribution from the other parties who shared the liability.

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17 (17 September 1936) 247 NZPD 238 (emphasis added).

18 Roderick Meagher and Ors, *Equity Doctrines and Remedies* (4th ed LexisNexis, Australia, 2002), at Chapter 10.

19 At [30].

20 At [32]–[33] (footnote omitted).

> The natural justice of the Law Reform Act adopts the longstanding policy of the common law courts. This common law court views with caution the proposition that claims brought against two or more defendants, all within time under the various statutes of limitation and resulting in a judgment against two or more defendants as joint tortfeasors, can, by way of another statute, allow the successful plaintiff to pick and choose as to who of the judgment debtors should ultimately pay the debt. And, moreover, prevent the party that actually pays from recovering contributions from the co-debtors under the same judgment.

[42] In ensuring that all who had caused a loss could potentially be held responsible for that loss, s 17 is, as Mr Taylor characterised it, "expansionist". Parliament's intention in enacting s 17 is important to bear in mind when considering the reach of the 10-year longstop in the Building Act.

Legislative consolidation of the right to contribution

[43] The Limitation Act 1950 (the 1950 Act) came into effect on 1 January 1952. With its passage, Parliament consolidated and amended certain enactments relating to the limitation of actions (and arbitrations).[21] Of particular significance to this proceeding are two provisions enacted to meet difficulties presented by *Merlihan v A.C Pope Ltd*, an English decision concerning recovery of contribution from a third party.[22]

Merlihan v A.C. Pope, Ltd

[44] William Merlihan was injured when travelling as a passenger in a Canadian War Department truck driven by Pagnello. The truck collided with a van. Merlihan sued the owner of the van, AC Pope Ltd and its employee Hibbert who drove the van. The plaintiff did not sue Pagnello. The defendants joined Pagnello 15 months after the collision. Shortly afterwards, judgment was given against the defendants who were ordered to pay damages to the plaintiff. Birkett J found that the negligence of both drivers contributed to the collision.[23]

[45] The defendants claimed contribution from Pagnello on the basis that had the plaintiff sued him, Pagnello would have been liable for the damage. The claim was

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21 Limitation Act 1950, Long title.
22 *Merlihan v A.C. Pope, Ltd* (1946) 1 KB 166.
23 At 169.

made under s 6(c) of the Law Reform (Married Women and Joint Tortfeasors) Act 1935. Section 6(c) provided:

> … any tortfeasor held liable … may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage …

[46] Pagnello argued he was not liable to the plaintiff who had not sued him at all and could not because the 12-month limitation period had expired. That was accepted. Pagnello contended that in order to make s 6(c) applicable to his case the words "in time" would have to be read into s 6(c) (so that it read "… tortfeasor who is, or would if sued *in time* have been liable…").

[47] Burkitt J said the question for determination was "difficult":[24]

> The claim here is for contribution by Pagnello on the ground that he being the "other tortfeasor, who is or would if sued have been liable in respect of the said damage," they can recover from him.
>
> The point is a new one; it has never been determined, and no real guidance on it exists.

[48] The Judge concluded it was not competent for the defendants to claim contribution from Pagnello because he was protected by the Limitation Act 1939 and it would not be a proper interpretation of s 6(c) to read it as if the material words were "who if sued *in time* would have been liable".[25]

[49] The result was that the defendants could not claim contribution from the third party. Burkitt J recognised the "great change" that the Law Reform (Married Women and Tortfeasors) Act had made in the law but the "particular difficulty" raised by the third party's defence had not been foreseen.[26]

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24 At 170.
25 At 170.
26 At 170.

Limitation Act 1950: s 14 and schedule 2

[50] The decision in *Merlihan v Pope* was met with a legislative response by the New Zealand Parliament which enacted s 14 in the Limitation Act 1950 and, via sch 2 of that Act, amended s 17(1)(c) of the Law Reform Act.

[51] Section 14 related to the accrual of a cause of action in relation to a claim for contribution or indemnity and provided:

> For the purposes of any claim for a sum of money by way of contribution or indemnity, however the right to contribution or indemnity arises, the cause of action in respect of the claim shall be deemed to have accrued at the first point of time when everything has happened which would have to be proved to enable judgment to be obtained for a sum of money in respect of the claim.

[52] The explanatory note to the Limitation Bill stated in relation to the clause which became s 14:[27]

> *Clause 14* sets out the time at which the cause of action arises in connection with a claim for contribution or indemnity. There is no corresponding provision in the [UK Limitation Act 1939 which the Bill substantially followed] but *the clause is included to meet difficulties revealed by the decision in the case of Merlihan v Pope, Ltd (1946) KB 166*.

The second legislative measure responding to *Merlihan v Pope* was the insertion of the words "in time" after the word "sued" in s 17(1)(c) of the Law Reform Act.[28] As amended, s 17(1)(c) now reads (with emphasis added):

> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—
>
> …
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued *in time* have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise …

[53] The explanatory note to the Limitation Bill records Parliament's intent in amending s 17(1)(c) in this way:[29]

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27 Limitation Bill (59–1) at (iii) (emphasis added).
28 Limitation Act 1950 s 35 and sch 2.
29 Limitation Bill 1950 (59–1) at iv.

> [The second schedule] also amends section 17(1)(c) of the Law Reform Act, 1936, in view of the decision in the case of Merlihan v Pope, Limited … so as to enable a tortfeasor to recover contribution from any other tortfeasor who is, or would if sued *in time* have been, liable in respect of the same damage.

[54] In summary, the 1950 Act protected a person's right to claim contribution while delaying the time at which the cause of action arose to the point when the person's liability was established, namely "the first point of time when everything has happened which would have to be proved to enable judgment to be obtained for a sum of money in respect of the claim".[30]

Limitation Act 2010

[55] The Limitation Act 2010 repealed the 1950 Act and implemented key recommendations made by the Law Commission.[31]

[56] In 1988, the Law Commission presented its report, *Limitation Defences in Civil Proceedings*.[32] Four years later the Law Commission produced Preliminary Paper No 19, *Apportionment of Civil Liability*.[33]

[57] The Commission noted that its work leading to its reports on statutes of limitation (including its report on *Limitation Defences in Civil Proceedings*) and its consultative activity revealed considerable concern about some of the rules concerning multiple liability disputes. Preliminary Paper No 19 was preceded by extensive research, review of overseas legislation, case law, law reform proposals and a significant degree of consultation with those having a particular interest in questions of civil liability.

[58] Mr Taylor submitted the Preliminary Paper has particular relevance because it was issued after the enactment of the 10-year longstop defence in the Building Act.

[59] I take from my review of the Law Commission's Preliminary Paper the following relevant points:

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30 Limitation Act 1950, s 14.
31 Limitation Bill 2009 (33-1) at 3.
32 Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, 1988).
33 Law Commission *Apportionment of Civil Liability* (NZLC PP 19, 1992).

(a) The Law Commission was of the provisional view that the *in solidum* liability rule (by which each wrongdoer is liable for a plaintiff's entire loss) should remain unchanged.[34] In reaching that view the Commission noted that any possible unfairness to defendants in maintaining a plaintiff's entitlement to select its defendant was subordinate to the "fundamental concern of the common law that a plaintiff should be able to recover the full amount of his or her loss".[35]

(b) In its section on limitation defences the Commission noted that unless some means was found to overcome the consequences of distinctions in the periods over which time runs for different rights of action, its proposal for contribution claims between defendants facing allegations of differing civil wrongs would create more circumstances in which the differences in time periods would be of importance.[36]

(c) The Commission acknowledged that even had its earlier proposal of a longstop defence of 15 years been adopted there would be a small number of cases in which time might run against one defendant but not another with the consequence that limitation dates for each might differ:

> [244] The question is therefore whether D1 should be able to claim contribution against D2 notwithstanding that P's claim against D2 is statute barred. Such a contribution claim is possible as between tortfeasors by virtue of s 17(1)(c) of the Law Reform Act 1936. The provision was amended in 1950 to confirm the legislative intent and now reads:
>
> > (c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued [in time] have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise ...
>
> [245] It had been determined under the equivalent English provision that the description "a tortfeasor who is or would have been liable" denoted any person who would have been held liable in tort had he been sued in a competent court, by proper process at a proper time and on evidence properly presented. It was enough that there was a time when P could

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34 At [171].
35 At [93].
36 At [242].

> successfully have brought an action against D2 either independently or jointly with the Defendant (*Harvey v R O'Dell Ltd* [1958] 2 QB 78). Later the High Court of Australia came to the same conclusion (*Brambles Constructions Pty ltd v Helmers* (1966) 114 CLR 213). So it is enough that D2 was once liable to P.
>
> [247] It can be argued that S 17(1)(c) deprives D2 of protection against a stale claim which is allowed to enter, as it were, by the back door. In order to combat the claim for contribution by D1 it may be necessary for D2 to rely upon the same witnesses who would have been called in defence of P's stale claim. Moreover, as D2 now has a defence against P, it cannot be said that the payment by D1 confers any benefit on D2.
>
> [248] Nevertheless, the Law Commission thinks that it is unreasonable that D1 should lose his or her contribution claim by reason of delay on the part of P. D1 will presumably be unable to influence P's behaviour vis a vis D2. It is conceivable that in some circumstances P's delay may be influenced by the thought that D1 will be unable to pass any portion of the damages claim on to D2 if P's claim against D2 is allowed to become statute barred. Whether this is so or not, it seems to us that D1 should not be disadvantaged by a situation arising after the injury was caused and over which D1 has no control.
>
> [249] …For these reasons the Law Commission suggests that the policy behind s 17(1)(c) of the Law Reform Act 1936 is correct, that P's claim against D1 should not be reduced where P's claim against D2 has become statute barred *but that D1's right of contribution against D2 should continue to be available notwithstanding the existence of that defence of D2 against P.*
>
> (emphasis added)

(d) The Commission considered the position in Ontario where a claim for contribution could only be brought within the plaintiff's action. The Commission considered there were many circumstances in which such a rule could result in an unfairness to a defendant who, for a variety of reasons, may not have sued a joint tortfeasor in time.

(e) The Preliminary Paper included a draft Civil Liability and Contribution Act, s 9 of which provided a wrongdoer with a right to contribution when that wrongdoer was obliged to pay damages in excess of the

proportion of the loss attributable to that wrongdoer.[37]

[60] Then in 1998 the Law Commission presented its Report 47, *Apportionment of Civil Liability*.[38] Where the Commission had reached a provisional view in its 1992 Preliminary Paper, it was now "of the firm view that no sufficiently compelling case for departure from the solidary rule has been made".[39] While it was the "plight of the 'deep pockets'" that prompted a retreat from solidarity liability in other jurisdictions, the Commission considered there were various other ways of addressing those problems without interfering with the law of contribution. Turning to the deep pockets of the territorial local authorities the Commission said:[40]

> … it is uncontroversial to observe that their liability for the civil consequences of negligent supervision of building and like activities is entirely the result of conscious judicial social engineering. Some would contend that such judicial activism is insupportable and that in any event the relevant facts on which policy decisions might be based were not adequately placed before the courts. A statutory revisiting of this topic would, on such a view, be appropriate.

[61] The Commission offered no concluded view on the problems associated with the plight of the deep pockets but maintained they were to be "determined in a principled way, and not warped or skewed solely to answer 'deep pocket' concerns".[41]

[62] The Commission recommended the enactment of the draft Civil Liability and Contribution Act contained in its report. Section 10 of the draft Act provided a wrongdoer with a "general right" to contribution when that wrongdoer" was obliged to pay damages in excess of the proportion of the loss attributable to that wrongdoer. Contribution could be claimed once the court ordered the wrongdoer to pay damages to the wronged person. Section 11 of the draft gave a defendant who wished to claim contribution from another wrongdoer the right to do so either by cross-claim or third party notice in the plaintiff's action, or in separate contribution proceedings.

[63] In 2007, an update report on limitation defences was produced for the Law Commission: *Limitation Defences in Civil Cases: Update Report for the Law*

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37 At 88-89.
38 Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998).
39 At [9].
40 At [15].
41 At [15].

Commission.[42] Of relevance to this proceeding are the following key points made in the section addressing shorter periods for contribution claims:[43]

(a) The 1950 Act did not set any specific limitation period. Rather the 1950 Act specified the date the cause of action accrued.

(b) A contribution claimant who was a party to litigation (either as a defendant or third party) would normally be in a position to know or explore at once whether a claim for contribution could be made. With the Law Commission's most recent recommendations for the enactment of a new limitation defences Act (taking into account the recommendations made in NZLC R6, NZLC R61 and later developments), a contribution claimant could wait until the amount of the primary claim had been finally quantified before commencing a claim against a contribution defendant or third party.

(c) Given that such a contribution claimant would be fully informed of the primary claim there seemed little justification for allowing more than one year following final quantification of the primary claim in which to bring a claim for contribution:[44]

> To allow up to six years, as at present, can mean that if the plaintiff does not sue until near the end of a six year period, a contribution claimant can wait for up to a further six years before bringing a proceeding. The result is that the contribution defendant may not face legal action for something like twelve years or double the basic period from after the original event.
>
> Such delay, if sanctioned by a limitation act, undermines the policies protective of defendants. This consideration supports a shorter period than normal for claims for contribution. A shorter period would also ensure that when such claims are brought, they can be dealt with closer to the time of the relevant events.

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42 *Limitation Defences in Civil Cases: Update Report for the Law Commission* (NZLC MP16, 2007).
43 At [81]–[84].
44 At [82].

(d) Accordingly, the Update Report recommended a period of one year in which a claim for contribution should be brought but that a "modified time extension and ultimate period" should apply.

[64] Ultimately, the Limitation Bill:

(a) was introduced in 2009 to replace the 1950 Act and to "encourage claimants to make claims without undue delay and protect defendants from the unjust pursuit of stale claims";[45]

(b) implemented key recommendations of the Law Commission in particular providing a general civil limitation defence to money claims which would be widely defined but "with specific exclusions, for example, claims for contribution…";[46]

(c) in relation to two "narrowly defined classes" of claims for contribution, provided a limitation period of two years after quantification of the claimant wrongdoer's liability.[47]

[65] Clause 32 was enacted, unchanged, as s 34 of the Limitation Act 2010:

> **34 Claim for contribution from another tortfeasor or joint obligor**
>
> (1) This section applies to a claim under section 17 of the Law Reform Act 1936—
>
> (a) by a tortfeasor (**A**) liable in tort to another person (**B**) in respect of damage; and
>
> (b) for contribution from another tortfeasor (**C**) who is, or would if sued in time by B have been, liable in tort to B (whether jointly with A or otherwise) in respect of that damage.
>
> (2) This section also applies to a claim—
>
> (a) made by a person (**A**) who is liable (otherwise than in tort) to another person (**B**) in respect of a matter; and
>
> (b) for contribution from a third person (**C**) who is, or would if sued in time by B have been, liable (otherwise than in tort) to B (whether jointly with A or otherwise) in a coordinate way in respect of that matter.

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45 Limitation Bill 2009 (33–1).
46 At 3.
47 Clause 32.

(3) C is liable to B in a coordinate way for the purposes of subsection (2)(b) if, and only if,—

(a) a common obligation underlies C's liability to B and A's liability to B; and

(b) payment or other discharge of C's liability to B would have the effect of relieving A, in whole or in part, from A's liability to B.

(4) It is a defence to A's claim for contribution from C if C proves that the date on which the claim is filed is at least 2 years after the date on which A's liability to B is quantified by an agreement, award, or judgment.

[66] Thus, the 2010 Act further consolidated the right to contribution in the following ways:

(a) Where s 14 of the 1950 Act had provided for a special start date, being the deemed date of accrual "at the first point in time when everything had happened which would have to be proved for judgment to be obtained for a sum of money in respect of the claim" in enacting s 34 Parliament provided for the first time a specific limitation period for contribution claims.

(b) Where, in relation to a money claim against a defendant, the limitation period ("primary period") is calculated from "the date of the act or omission on which the claim is based",[48] the two-year period within which a claim for contribution under s 17(1)(c) of the Law Reform Act must be made, runs from the date when the claimant's liability is quantified.[49] Thus, for contribution claims, the date of the accrual of a cause of action is different from the date on which time starts running for money claims between plaintiffs and defendants.

(c) Although a 15-year longstop defence to a money claim is enacted,[50] that defence does not apply to claims for contribution. Section 12(3) expressly excludes from the definition of a money claim, "a claim for contribution from another tortfeasor or tort obligor (*see* section 34)".

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48 Limitation Act 2010, s 11(1). However, where the claimant has late knowledge of the claim or the claim is made after the primary period, a three-year late knowledge period applies or a 15-year longstop period applies.

49 Section 34(4).

50 Limitation Act 2010, s 11(3).

The exclusion of claims for contribution from the Act's primary limitation periods, maintains the distinction between a claim for contribution by a "tortfeasor" and a primary money claim by a plaintiff against a defendant.

(d) The language of s 34(1)(b), "tortfeasor who is, or would if sued in time…have been liable…", mirrors the language of s 17(1)(c) of the Law Reform Act following its amendment to overcome the difficulties posed by *Merlihan v A.C. Pope, Ltd*.[51]

Conclusion

[67] The decisions Beca relies on in support of its position turn on:

(a) the acceptance by successive Courts of "finality as a primary motivator behind the enactment of the longstop provisions" in the Building Act;[52] and

(b) the conclusion that the longstop provision in the Building Act is "as plainly worded as it is possible to be";[53] that in using the phrase "civil proceedings", Parliament endeavoured to capture "every form of civil proceeding regardless of its source or makeup" and that if Parliament had intended s 91(2) or s 393(2) to apply only to claims between a plaintiff and a defendant, it would have used wording to make that fact clear".[54]

[68] It has been said in successive High Court decisions that powerful policy considerations support an interpretation of s 91(2) and s 393(2) that makes no distinction between a primary claim by a plaintiff and a claim for contribution against a concurrent tortfeasor. I have had the considerable benefit of detailed submissions

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51 As to which see discussion at [43]–[54] above.

52 *Minister of Education v James Hardie New Zealand* above, n 8 at [50] citing the Court of Appeal's endorsement of Glazebrook J's summary of the legislative history.

53 At [58](c) citing *Dustin v Weathertight Homes Resolution Services* HC Auckland CIV-2001-404-1974, 29 August 2008.

54 *Body Corporate 169791 v Auckland City Council* HC Auckland CIV-2004-404-5225, 17 August 2010 at [41].

on the legislative history leading to the enactment of s 17(1)(c) of the Law Reform Act, and of its subsequent amendment. That, together with the further insight provided by the various Law Commission reports and papers and legislative materials, has led me to a different view of the scope of s 393(2) of the Building Act, a view I have reached in light of the following propositions:

(a) The Limitation Act 2010 followed the Building Act 2004. The legislature was evidently mindful of the Building Act 2004 and of s 393 in particular, which was amended by the 2010 Act.[55]

(b) By s 393 of the Building Act, the 2010 Act applies to civil proceedings against any person if those proceedings arise from building work as described in s 393(1)(a) of the Building Act or arises from performance of the functions described in subsection (1)(b).[56]

(c) While the phrase "civil proceeding" is not defined in the Building Act it is defined in the Limitation Act 2010:[57]

> **civil proceeding** means a proceeding that is neither a criminal proceeding nor a disciplinary proceeding.

(d) The Limitation Act 2010 makes a distinction between an "original claim" and an "ancillary claim":[58]

> **ancillary claim** means a claim that relates to, or is connected with, the act or omission which another claim (the **original claim**) is based and is—
>
> …
>
> (e) a claim made by way of a third party, fourth party, or subsequent party procedure; or
>
> (f) any other claim that is ancillary to the original claim.

(e) In relation to a claim for contribution, (an ancillary claim), s 34 of the Limitation Act 2010 (the relevant subsections of which are reproduced

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55 Limitation Act 2010, s 58 and schedule.
56 Building Act 2004, s 393(1).
57 Limitation Act 2010, s 4.
58 Section 4.

immediately below) applies a longstop period of two years running from the date when the tortfeasor's liability to another is quantified.

> **34 Claim for contribution from another tortfeasor or joint obligor**
>
> (1) This section applies to a claim under section 17 of the Law Reform Act 1936—
>
> (a) by a tortfeasor (**A**) liable in tort to another person (**B**) in respect of damage; and
>
> (b) for contribution from another tortfeasor (**C**) who is, or would if sued in time by B have been, liable in tort to B (whether jointly with A or otherwise) in respect of that damage
>
> …
>
> (4) It is a defence to A's claim for contribution from C if C proves that the date on which the claim is filed is at least 2 years after the date on which A's liability to B is quantified by an agreement, award, or judgment.

(f) It can be seen that in the 2010 Act Parliament enshrined the right to contribution by:

(i) exempting a claim for contribution from the definition of money claims;

(ii) enacting a two-year period within which claims for contribution are to be brought;

(iii) specifying a date for accrual of a cause of action for a contribution claim that is different from the date on which time starts running for money claims.

[69] In a sense s 17(1)(c) of the Law Reform Act, together with the operative provisions of the 2010 Act, (and before it the Limitation Act 1950) create a code for the bringing of contribution claims. The right to contribution is untouched by s 393 and the longstop in s 393(2) (and was untouched by s 91 and the longstop in s 91(2)). The "civil proceedings" to which s 393 of the Building Act applies are original claims. Civil proceedings, that is original claims, are governed by the Limitation Act 2010 and

attract the defences in that Act,[59] except that a longstop period of 10 years applies to such proceedings instead of the 15-year longstop under the 2010 Act. The Building Act's 10-year longstop does not override the specific two-year longstop in relation to contribution claims to which s 34 of the Limitation Act 2010 apply.

[70] This interpretation of s 393(2) continues to be consistent with the important objectives and "powerful policy considerations" leading to the enactment of the 10-year longstop in the Building Act.

[71] I turn to two of the authorities that Mr Ring identified as being on point. The first is *Klinac v Lehmann*, which contains Glazebrook J's description of the legislative history of s 91 of the Building Act 1991.[60] Mr Taylor did not seek to argue that the decision was wrong or that the legislative history was inaccurately described. Mr Taylor's point was that the inferences that had been drawn from *Klinac* about the legislation were wider than the history or the legislation itself reflected.

[72] As I have mentioned, no party claimed contribution and no issue of contribution arose in that case. The issue on appeal to the High Court was whether the s 91(2) longstop applied only to negligence claims or also to causes of action for misrepresentation and breach of warranty. Glazebrook J traversed the legislative history leading to the enactment of s 91(2). After doing so, her Honour decided the history suggested the "legislative intent related to negligence only".[61]

[73] A similar issue was before the Court of Appeal in *Gedye v South*, another of the several authorities relied on by Beca in support of its position.[62] After referring to Glazebrook J's "helpful discussion of the background" to the enactment of the longstop, the Court of Appeal went on to differ from *Klinac.*[63] The Court of Appeal regarded s 91(2) to be "cause of action neutral".[64] Consequently, s 91(2) did apply to the claim for breach of warranty at issue in that proceeding.

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59 Building Act 2004, s 393(1).
60 *Klinac v Lehmann* above n 12.
61 At [51].
62 *Gedye v South* above n 12.
63 At [30].
64 At [48].

[74] The Court of Appeal made two further observations which I regard as both relevant and significant to the dispute in this Court. Having satisfied itself that the terms of s 91(2) were clear, the Court of Appeal added: "[r]ead in context the act or omission referred to in s 91(2) is that of the defendant on which the proceeding is based".[65] In *Gedye v South* the basis of the proceeding was the defendant's act of warranting to the plaintiff purchasers of the defendant's property, that the building work was compliant. In other words, and as with *Klinac*, no claim for contribution was made and no issue of contribution arose. The Court of Appeal's finding that s 91(2) applied to the act or omission of the defendant is consistent with my conclusion that s 393(2) applies to original and not ancillary claims and that the phrase "civil proceeding" is to be read in that light.

[75] Such an approach is entirely consistent with the legislature's concern to avoid "temporally unlimited liability of those involved in the construction industry".[66] Under s 393(2) an original claim (a civil proceeding) may not be brought against a person after 10 years or more from the date of the act or omission on which the proceeding is based.

[76] Mr Taylor made the point that for a contribution claim to get off the ground, liability against the original defendant must be established. If claims by plaintiff building owners are not brought within the 10-year longstop it follows that without quantification of a defendant's liability to a plaintiff, others cannot be exposed to contribution claims. The point is well made and illustrates that on the construction of s 393(2) which I favour:

(a) the two sets of interests that are at the heart of s 393 — the interests of plaintiffs in accessing justice and the interests of defendants in not being disadvantaged by stale claims — continue to be balanced as the legislature intended;

(b) the right to contribution conferred by s 17 of the Law Reform Act is given effect; and

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65 At [43].

66 As Glazebrook J described it in *Klinac v Lehmann* above n 12, at [16].

(c) the defence to a claim of contribution enacted in s 34(2) of the Limitation Act 2010 applies without thwarting the objectives of s 393(2).

[77] The High Court decisions Beca relies on have proceeded on the assumption that had Parliament intended to exclude claims for contribution from the longstop in s 393(2) it would have said so expressly. But there are limitations on the application of such an approach to statutory interpretation. The principle that general provisions do not derogate from specific provisions is applicable here. That principle, generalia specialibus non derogant, has been defined in the following way:[67]

> [W]here there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words without any indication of a particular intention to do so.

[78] In considering the reach of s 393(2) the principle is justifiably applied particularly in light of Parliament's purposeful amendment to the Law Reform Act following *Merlihan v A.C Pope Limited* in order to consolidate a defendant's right to seek contribution from a joint tortfeasor.[68] It is unlikely that, without express words, Parliament intended "by a sweeping general provision to alter a rule passed to regulate a specific situation that was carefully considered and formulated at the time".[69]

[79] For the foregoing reasons I am unable to conclude that the Council's claim for contribution is so clearly statute barred that it must be struck out.

Ongoing duty of care

[80] The Council submits that even if the longstop defence applies to its contribution claim, Beca had a duty of care that continued until the project was completed in August 2011 and it failed to remedy any defects in its design of the building.

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67 *Seward v Vera Cruz (Owners)* (1884) 10 App Cas 59 (HL) at 68, cited in Burrows and Carter *Statute Law in New Zealand* (5th ed LexisNexis, Wellington, 2015) at 475.

68 *Merlihan v A.C Pope Limited* discussed above at [43]–[54].

69 Burrows and Carter *Statute Law in New* Zealand, above n [67], at 476.

[81] Mr Ring submitted the courts are generally reluctant to impose continuing duties to identify and correct errors. To do to would mean that "time would never start to run because the obligation to correct would remain until correction was effected".[70] Mr Ring also submitted that in relation to the longstop the courts have rejected the concept of a continuing duty when a set date can be determined. Where, as in this case, a specific date for the act or omission can be stated there is no basis for maintaining or holding that there is a continuing duty of care.

[82] The Council relies on the Deed of Professional Care – Engineer that Beca entered into with CentrePort, BNZ and Fletcher Construction Co Ltd under which Beca covenanted that it would exercise care, skill and diligence in providing the "agreed services".[71] The Council relies also on Beca's acceptance under the Deed, that it continued to owe a duty of care to provide its services with care, skill and diligence.

[83] As I understand the pleadings and the argument, the essence of this part of the Council's case is that Beca's duty of care continued beyond the issuing of the PS4 for the substructure and superstructure because Beca continued to provide services for the "project" which included the completion of the building. Under the Deed of Professional Care – Engineer, "Project" is defined as:

> … the undertaking of design, construction and completion of the buildings at Building Sites F1 and F2 in the commercial office park at the Port of Wellington known as Harbour Quays.

[84] The Council emphasises in the definition, the "completion" of the buildings. What gives me pause at this point is that under the Deed of Professional Care Fletcher Construction was the "Contractor" and Beca was the "Consultant". The contractor (not the consultant) was engaged to "undertake the design and construction for the Project pursuant to a construction contract…". The definition of project appears, therefore, to have no relevance to Beca which, as the "consultant" was to provide services pursuant to an agreement entitled Consultancy Agreement for

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70 *Gosper v Re Licensing (NZ) Ltd* [1998 3 NZLR 580 (CA) at 584.
71 See the relevant clauses set out at [21] above.

Services – Engineer. Under that agreement, which was only between CentrePort and Beca, "project" is defined differently:

> …"**Project**" means the construction of the building on land situated at the Port of Wellington.

[85] Putting to one side the relevance of the definition of "project", ultimately I accept the Council's submission that the full extent of Beca's review and involvement during its 2013 engagement will be clearer when discovery and inspection are completed.

[86] Mr Ring submitted that, as against the Council's non-expert deponent, Beca has put up an affidavit from an engineer (Mr Lander) who has sworn that none of Beca's engagements between 2009 and 2014 related to the superstructure's or substructure's design or the correctness of the PS4. I take Mr Ring's point but Mr Lander has stated simply that at no stage in providing the further services, did Beca become aware of any defects in the design of the building. The Council, on the other hand, relies on documents that suggest in 2013 Beca was looking at the seismic capabilities and capacities of the design and that if Beca did review its original design, it failed to identify any defects. This omission, the Council says, falls well within the limitation period.

[87] In the end, Beca has not shown on the balance of probabilities that the Council cannot succeed. I am unable to be confident of material facts. In those circumstances, the summary judgment procedure is inappropriate.

Disposition

[88] Beca's application for orders striking out the Council's amended statement of claim dated 9 March 2020 is dismissed.

[89] Beca's alternative application for summary judgment against the Council is dismissed.

[90] Under r 14.8 of the High Court Rules 2016, costs on opposed interlocutory applications are to be fixed unless there are special reasons for not doing so. I am

unaware of any special reasons. I observe that the arguments and submissions concerning the limitation and longstop points occupied most of the one-day hearing and that the Council's written submissions were detailed and extensive.

[91] Having successfully opposed the application to strike out, the Council is entitled to costs which I award on a 2B basis together with reasonable disbursements as fixed by the Registrar in relation to the unsuccessful application to strike out.

Karen Clark J

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